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IN THE

# Supreme Court of the United States

October Term, 1981

No. ———

MICHAEL and JOYCE McKEE,
*Petitioners,*

vs.

THE COUNTY OF RAMSEY and its DEPARTMENT OF TAXATION, and the STATE OF MINNESOTA,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioners stated a cause of action and may be permitted to attempt to prove in any subsequent trial that Respondents violated the First Amendment to the Constitution of the United States which prohibits the establishment of religion where Petitioner taxpayers allege the use of a portion of their real estate taxes levied on the homestead by Respondents to promote and actively engage in state sponsorship of elective abortion, elective contraception and elective sterilization by the use of Respondents' personnel, financial resources, and administrative, public facilities and methods which foster and promote and prefer such activities repugnant to the conscience of the Appellant taxpayers and in violation of the obligation of the Respondents to be religiously neutral.

2. Whether the Petitioners stated a cause of action and may be permitted to attempt to prove in any subsequent trial that Respondents violated Article 1, Section 16 of the Minnesota State Constitution which prohibits any preference be given by law to any religious establishment where Petitioner taxpayers allege the use of a portion of their real estate taxes levied on their homestead by Respondents to promote and actively engage in state sponsorship of elective abortion, elective contraception, and elective sterilization by the use of Respondents' personnel, financial resources, and administrative, public facilities and methods which foster and promote and prefer such activities repugnant to the conscience of the Appellant taxpayers and in violation of the obligation of the Respondents to be religiously neutral.

3. Whether the Petitioners have stated a cause of action and may be permitted to prove in any subsequent trial that

the Respondents violated the First Amendment to the Constitution of the United States which guarantees the free exercise of religion where the Petitioners as homeowners and real estate property taxpayers allege that the action of the Respondents in levying real estate taxes on their homestead, a portion of which is used for the support and payment of elective abortion, elective contraception, and elective sterilization, and which violates their conscientiously-held religious beliefs and interferes with their freedom of conscience and religion by their forced cooperation and by the coercion of forcing them to choose between their fundamental liberty and property interest in home ownership and their religious beliefs in the absence of any public purpose or compelling state interest respecting the use of such public tax monies for such purposes.

4. Whether the Petitioners have stated a cause of action and may be permitted to prove in any subsequent trial that the Respondents violated Article I, Section 16 of the Minnesota State Constitution which prohibits control of or interference with the rights of conscience where the Petitioners as homeowners and real estate property taxpayers allege that the action of the Respondents in levying real estate taxes on their homestead, a portion of which is used for the support and payment of elective abortion, elective contraception, and elective sterilization, and which violates their conscientiously-held religious beliefs and interferes with their freedom of conscience and religion by their forced cooperation and by coercion of forcing them to choose between their fundamental liberty and property interest in home ownership and their religious beliefs in the absence of any showing by the Respondents of any threat to the peace or safety of the State respecting the use of such monies for such purposes.

5. Whether the Petitioners have stated a cause of action and may be permitted to prove at any subsequent trial that the action of the Respondents in requiring them to pay property taxes and the expenditure of general revenues by the State or any of its political subdivisions for the support and payment of elective abortions, sterilizations and contraceptions represents taxation and expenditure for an illegal purpose not permitted by law as it represents taxation and expenditure for solely to advance on individual privacy interest and, outside the scope of authority of the State or its political subdivisions based upon the prior decisions of the United States Supreme Court.

6. Whether the Petitioners have stated a cause of action and may be permitted to prove at any subsequent trial that the action of the Respondents in requiring them to pay property taxes and the expenditure of general revenues by the State or any of its political subdivisions for the support and payment of elective abortions, sterilizations and contraceptions represents taxation and expenditure for an illegal purpose not permitted by law as it represents taxation and expenditure in contravention of the explicit laws and statutes of the State of Minnesota or without specific legal authority and in violation of the Minnesota State Constitution which permits taxation only for public purposes (Article X, Section 1), and prohibits taxation for private purposes (Article XII, Section 1).

## LIST OF ALL PARTIES

All parties to this proceeding appear in the caption of this case in this Court.

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

### CITATION TO OPINIONS BELOW

The official report of the per curiam opinion of the Supreme Court of the State of Minnesota appears as *McKee v. County of Ramsey*, 316 N.W.2d 555 (Minn. 1982). In addition, the Supreme Court of the State of Minnesota issued an unreported Order dated April 12, 1982 which denied the Petitioners' petition for re-hearing. The Opinion and Order denying re-hearing are reproduced in the Appendix.

### STATEMENT OF JURISDICTIONAL GROUNDS

The per curiam opinion of the Supreme Court of the State of Minnesota was entered March 5, 1982. A timely petition for re-hearing was denied on April 12, 1982 and this petition for certiorari was filed within 90 days of that

date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257 as Petitioners claim a right, title, privilege or immunity which is specifically set up or claimed under the Constitution of the United States.

## OPINIONS DELIVERED BY THE DISTRICT COURT AND THE SUPREME COURT OF THE STATE OF MINNESOTA

Memorandum Order of Ramsey County District Court dated August 12, 1981.

Per Curiam Opinion of the Minnesota Supreme Court filed March 5, 1982.

Order of the Minnesota Supreme Court dated April 12, 1982 denying Petitioners' petition for re-hearing.

All of these are reproduced in the Appendix.

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

First Amendment to the Constitution of the United States.

Article I, Section 8, of the Constitution of the United States.

28 United States Code §1257.

Federal Statutes Title 42, Public Health, CFR 441.251-441.259.

Article I, Section 16, of the Minnesota State Constitution.

Article X, Section 1, of the Minnesota State Constitution.

Article XII, Section 1, of the Minnesota State Constitution.

Minnesota Statutes:

Minn. Stat. 145.925, Sub. 7

Minn. Stat. 256B.011.

Minn. Stat. 256B.02, Subd. 8(13)

Minn. Stat. 256B.40

Minn. Stat. 273.13

Minn. Stat. Chap. 279, et seq.
Minn. Stat. 290.48
Minn. Stat. Chap. 510.01, et seq.

## STATEMENT OF THE CASE

There is no trial record in this case.

The Appellants' claims were summarily dismissed by the trial court without any evidentiary proceeding and upheld on appeal to the Minnesota Supreme Court. The Statement of the Case therefore consists of the allegations in the Amended Complaint of the Petitioners, the Answer of the Respondent County of Ramsey, the Memorandum Order of the Trial Court dated August 12, 1981 and the Per Curiam decision of the Minnesota Supreme Court dated March 5, 1981 unholding the summary dismissal of the trial court. In addition, it includes the State Statutes, State and Federal Constitutional Provisions and Federal Regulations applicable to the Petitioners' claims, all of which are reproduced in the Appendix.

The stage of proceedings in Trial Court and Appellate Court at which federal questions sought to be reviewed were raised and method or manner of raising them is set forth as follows:

### I. ESTABLISHMENT OF RELIGION CLAIMS

The Establishment of Religion Claim in violation of the Constitution of the United States was raised in Appellants' Amended Complaint. The trial court in its Memorandum Order dismissed the claim based upon *Harris v. McRae* 100 S.Ct. 2671 (1980).

The Petitioners included as part of the Establishment of Religion Claim on appeal to the Minnesota Supreme Court the following—

1. The informed consent criteria used by the Respondents represented a preference for non-believers over believers and violated the doctrine of religious neutrality.

2. The Respondents established the religion of secular humanism as their policies and procedures fostered several tenets of the religion of secular humanism.

## II. FREE EXERCISE OF RELIGION CLAIMS

The Petitioners raised the free exercise of religion claim in alleged violation of the Constitution of the United States in their Amended Complaint which was considered by the trial court. The primary basis of the alleged violation was that Petitioners were moral cooperators by payment of tax monies, a portion of which were used to pay for elective abortion, sterilization and contraception. Further, that such actions were coercive by the Respondents compelling Appellants against their conscience to pay for such activities from their real estate taxes on their homestead. The Petitioners alleged in the trial court that such activities did not serve any secular purpose nor were they carried out pursuant to any compelling state interest as required by law and prior decisions of this Court.

On appeal to the Minnesota Supreme Court Petitioners raised the issue that the homestead of Petitioners was itself a protected liberty interest and that the action of the Respondents forced Petitioners to choose between their pro-

tected liberty interest in their homestead and their conscience. The appeal brief further developed the law respecting compelling state interest aspect and provided additional background information and citations in support of the violation of the rights of conscience claim and the violation of the free exercise claim of the Petitioners.

## III. PRIVACY OR ILLEGAL PURPOSE CLAIMS

The Petitioners in their trial brief argued to the trial court that the payment of the tax and expenditure of funds and resources of the Respondents for elective abortion, contraception and sterilization was illegal and lacked any secular purpose as they were for non-medically necessary purposes. The trial court found that the funds and resources were expended for "declared public purposes" and pursuant to "legislatively decreed purposes". (See Memorandum Order in Appendix.)

The Petitioners in their brief to the Minnesota Supreme Court specifically cited the statutory authority in Minnesota Statutes 256B which limited abortion funding to medically necessary abortions as defined by various state statutes. On appeal, the Petitioners also expressly cited the Minnesota State Constitution which prohibits taxation for a private purpose and alleged that the activities complained of represented taxation for a private purpose without specific legislative authority.

Petitioners also cited in their appeal brief the prior decisions of the U. S. Supreme Court in support of the right of privacy respecting elective abortion, contraception and sterilization and claimed, as a matter of law, that these should be deemed private interests for which no public tax funds or resources could be used.

## REASONS FOR GRANTING THE WRIT

### 1. THE RESPONDENTS ARE IN VIOLATION OF THE ESTABLISHMENT OF RELIGION CLAUSE BECAUSE THEIR ACTIONS AS ALLEGED ARE NOT RELIGIOUSLY NEUTRAL.

Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general. James Madison observed in his famous Memorial and Remonstrance Against Religious Assessments, that—

> "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." 2 Writings of James Madison 183, 186 (Hunt ed. 1901).

The United States Supreme Court has consistently held that the government must be neutral in dealing with religious matters. *Walz v. Tax Commission*, 397 U.S. 664, 669 (1979); *Abington School District v. Schempp*, 374 U.S. 203 (1963); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Epperson v. Arkansas*, 393 U.S. 97 (1968). Thus, a state may not favor "secularism" over religion. Issues relating to the public schools are illustrative. Justice Clark in *Abington School District v. Schempp*, 374 U.S. 203, 225 (1963) specifically pointed out that the State may not establish a "religion of secularism" in the public schools. Citing *Zorach*, Clark indicated that such a religion of secularism is

established when the school system affirmatively opposes or exhibits hostility to religion, thus "preferring those who believe in no religion over those who do believe". See *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). Similarly, in *Everson v. Board of Education*, 330 U.S. 1, 18 (1947) Justice Black said that the First Amendment:

> "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." *Id.*, at 18.

The establishment clause "requires that government . . . effect no favoritism among sects" when government violates the clause's "core" concept of neutrality, the absolutist component of the establishment clauses compels an immediate result. *Walz v. Tax Commission*, 397 U.S. at 695 (opinion of Justice Harlan). In such cases, "the inquiry . . . can end at this point. Neutrality . . . stand(s) as (a) barrier against the most egregious and hence divisive involvement in religious matters." *Id.*

### A. THE APPLICABLE "INFORMED CONSENT CRITERIA" REPRESENT A VIOLATION OF RELIGIOUS NEUTRALITY.

An example of preference for non-belief over belief and therefore a violation of religious neutrality is found in the informed consent definitions in various statutes which apply to the facts and circumstances of this case. For example, informed consent criteria for sterilization appear in the Federal Statutes at Title 42, Public Health CFR 441.257 (see Appendix).[3] Another example is M.S.A. Section 145.925, Subd. 7 (see Appendix). This provision was

part of a Family Planning Grants Act passed by the Minnesota state legislature in 1978 which was struck down on equal protection grounds in *Planned Parenthood of Minn. v. State of Minn.*, 612 F.2d 359 (1980), for reasons which were unrelated to the point under discussion here. This portion of the statute described certain information which was required to be discussed with any person, requesting counseling or family planning methods or procedures by those agencies specified as eligible to receive family planning grants. It is to be noted no discussion of moral, religious or conscientious aspects were mentioned, as part of the "informed consent" for either the sterilization or family planning counseling.

In both statutes the appeal is solely to the self-centered autonomous person devoid of any family concerns, appeals to morality, decency or consent. The sole consideration is the body. There is no concern for anything higher than the physical. It assumes that one is basically good and that all one has to do is receive adequate information and then act upon it. The informed consent criteria rely solely on the natural as its source of information. This is limited to see, hear, touch, feel data. There is no supernatural element,

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*The forms used by Respondents for sterilization correspond to those set forth in the Federal regulations. The informed consent forms used by Respondent, County of Ramsey, for abortion reflect the criteria set forth in MSA 145.925, Subd. 7.

no prayer, no appeal to conscience,[3] no appeal to what might be called "traditional" morality or values. It tends to counsel persons away from fidelity, charity, commitment to others, family and the divine will and order of life. The criteria are solely "secular.'" Humanist Manifesto, II (1973), supra, Elective Sterilizations, Univ. of Penn. LR Vol. 113, 415, 418 (1965); Louisell, David, Does the Constitution Require a Purely Secular Society? 26 Cath. L. Rev. 20 (1976); Guiness, Os, The Dust of Death—Chapter on The Striptease of Humanism (1973), pp. 14-39; Whitehead, John W., and John Conlon, The Religion of Secular Humanism and its First Amendment Implications, 10 Texas Tech. L. Rev. 1 (1978); Pfeffer, Leo, Issues That Divide: The Triumph of Secular Humanism, Journal of Church and State, Spring 1977, pp. 203-216.

## B. THE RESPONDENTS EXPRESSLY OR IMPLIEDLY FOSTER SEVERAL TENENTS OF THE RELIGION OF SECULAR HUMANISM.

In *Torcaso v. Watkins*, 367 U.S. 488, 495, note 11

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[3]"Informed consent" counseling without reference to conscience is unique to humanism. See in contrast the free exercise claim of the United Methodist Church (Women's Division) *Harris*, 100 Sup. Ct. at 2690, note 23 (not formally considered due to lack of standing) who sued on behalf of "women of all religious and nonreligious persuasions and beliefs who have, in accordance with the teaching of their religion and/or the dictates of their conscience determined that an abortion is necessary." See also *Paul C. Vitz, Psychology as a Religion: The Cult of Self-Worship* (1977), page 101 who says: "Selfist theory emphasized the isolated conscious self as the sole judge of what the self should value and how it should act. Such an emphasis almost guarantees the breakdown of the higher ideals into a rationalization of selfishness permeated with narcissism."

[4]*The Whole Person in a Broken World*, Paul Tournier (1947) p. 11, 12. "Modern man suffers from a repression of conscience"; *The Culture of Narcissism*, Christopher Lasch (1979) p. 33, "the contemporary climate is therapeutic, not religious. People . . . hunger not for personal salavation . . . but for the momentary illusion of personal well-being, health and psychic security".

(1960) the United States Supreme Court observed that secular humanism is a religion and cited *Washington Ethical Society v. District of Columbia,* 101 U.S. App. D.C. 371, 249 F.2d 127; *Fellowship of Humanity v. County of Alameda,* 153 Cal. App.2d 673, 315 P.2d 394; II Encyclopedia of the Social Sciences 293; 4 Encyclopedia Britannica (1957 ed.) 325-327; 21 *id.* at 797; Archer, Faiths Men Live By (2d ed. revised by Purinton), 120-138, 254-313; 1961 World Almanac 695, 712; Year Book of American Churches for 1961, at 29, 47.

The Humanist Manifesto II (1973) which is probably the best known doctrinal statement of "secularism" or "secular humanism" includes the following language of which the following *several* tenets are expressly or impliedly fostered by the state both in the *means* and *ends* employed in the instant case.

> "We believe that traditional dogmatic or authoritarian religions that place revelation, God, ritual, or creed above human needs and experience do a disservice to the human species.
>
> Promises of immortal salvation or fear of eternal damnation are both illusory and harmful. They distract humans from present concerns, from self-actualization and from rectifying social injustices.
>
> We affirm that moral values derive their source from human experience. Ethics is autonomous and situational, needing no theological or ideological sanction.

Ethics stems from human need and interest. To deny this distorts the whole basis of life.

We strive for the good life, here and now.

In the area of sexuality, we believe that *intolerant attitudes, often cultivated by orthodox religious and puritanical cultures, unduly repress sexual conduct. The right to birth control, abortion and divorce should be recognized.*" (emphasis added)

Humanist Manifesto II (1973); selected portions. The Signers of Humanist Manifesto II included Paul Blanshard, a leading proponent of the separation of religion from the state; Dr. Francis Crick, the discoverer of the structure o fthe DNA molecule; Dr. Alan Guttmacher, president of the Planned Parenthood Federation of America; Lawrence Lader, chairman of the National Association for Repeal of Abortion Laws; Professor B. F. Skinner of Harvard University; Vashti McCollum, the plaintiff in McCollum v. Boaru of Educ. and former president of the American Humanist Association; Joseph Fletcher, leading proponent of situation ethics; Betty Freidan, founder of National Organization of Women ,and others.

The case at issue is thus analogous to *McCollum v. Board of Education*, 333 U.S. 203 (1948); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), and *Epperson v. Arkansas*, 393 U.S. 97 (1968). In these cases as in the instant case the State is using the prestige, power and influence of its public institutions, public officials and tax funds to aid and prefer "one religion and violate the concept of religious neutrality. *See Walz v. Tax Comm.*, 397 U.S. 664, 696 (1969) J. Harlan concurring opinion; see also Religion: Establishment, Free Exercise and Abor-

tion, Robert A. Destro, New Perspectives on Human Abortion ed. Hilgers, Horan and Mall (1981) pp. 236-256.

## 2. *HARRIS V. McRAE* IS NOT APPLICABLE TO PETITIONERS' ESTABLISHMENT OF RELIGION CLAIMS.

The claim that *Harris v. McRae*, 100 S.Ct. 2671 (1980), is dispositive of Petitioners' establishment of religion claim is incorrect. Petitioners have alleged both Free Exercise violation and Establishment of Religion violation. *Harris* dealt only with Establishment of Religion claims. The importance of the Free Exercise aspect was expressed by Justice Brennan in his concurring opinion in *Abington School District v. Schempp:*

> "But we must not confuse the issue of governmental power to regulate or prohibit conduct *motivated by religious beliefs* with the quite different problem of compelling behavior *offensive to religious principles*. 374 U.S. at 250 (Emphasis in original.)

In *Harris*, the establishment of religion allegation was based on the view that the Hyde Amendment corresponded with the tenets of the Catholic religion and the law was *motivated by religious belief*. Petitioners have also alleged the element of coercion by *compelling behavior offensive to religious principles*. Petitioners are forced to choose between home ownership and their consciences. Payment of taxes by Petitioners is an affirmative act—as Petitioners have stated they are "moral cooperators" in activity patently offensive to their conscientiously held beliefs. Petitioners actively participate in the wrong by making such payment. This is far more than the *Harris* case.[4]

For example, Father Peter J. Riga commented in an article advocating the withholding of taxes for abortion—

> "The exercise of our religion absolutely forbids us to contribute to a system of death which denies our faith religion root and branch. Shall we be denied the free exercise of religion, in so grave a matter, while others are protected, say, from hearing prayers in public school, as freedom from religion?" Riga, U. S. Catholic, Sept. 1975, pp. 111-112.

The Rev. E. F. Healy and the Rev. J. F. Meara teach that the Moral Law requires that any proposal which demands cooperation in an action wrongful on its face, must be refused, even when life itself is at stake, *Moral Guidance*, (1942, 1960) pg. 22. In this case the right to own and enjoy a home is at stake. By contributing funds for the pur-

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[4]See interview of psychiatrist and civil rights advocate Thomas Szasz by Paul Kurtz in The Humanist No. 2, 1973, pp. 4-9 who observed that use of tax monies to compel devout Catholics to pay for abortions is the kind of anti-religious activity prohibited by the First Amendment.

poses at issue the Appellants participate and cooperate in the wrong and violate the Moral Law in the process. The element of coercion and active participation in a moral wrong clearly distinguishes Petitioners' claims from *Harris v. McRae.*

### 3. THE OBLIGATION TO OBEY ONE'S CONSCIENCE INVOLVES DUTIES HIGHER THAN ONE'S OBLIGATION TO THE STATE.

Appellants stated in their Amended Complaint that they believe abortion constitutes the taking of human life and sterilization and contraception constitute interference with divinely prescribed laws governing the transmission of human life. The statement in Appellants' Complaint is very similar to a statement of a conscientious objector who was granted an exemption from military service on the basis of conscience. The case was *Welsh v. United States,* 398 U.S. 333, 343 (1970), and the essence of Welsh's philosophy was found in these words:

> "I believe that human life is valuable in and of itself; in its living, therefore, I will not injure or kill another human being. This belief (and the corresponding 'duty' to abstain from violence toward another person) is not 'superior to those arising from any human relation'. On the contrary: it is essential to every human relation. I cannot, therefore, conscientiously comply with the Government's insistence that I assume duties which I feel are immoral and totally repugnant."

The United States Supreme Court has further stated "in the forum of conscience, a duty to a moral power higher than the State has always been maintained". The reservation of that supreme obligation, as a matter of principle,

would unquestionably be made by many of our conscientious and law-abiding citizens. "The essence of religion is a belief in a relation to God involving duties superior to those arising from any human relation." *U.S. v. Macintosh*, 283 U.S. 605, 633 (1931) (C.J. Hughes dissenting); *United States v. Seeger*, 380 U.S. 170-172. "Conscience and belief are the main ingredients of First Amendment rights . . . conscience is often the echo of religious faith . . . the welfare of the single human soul (is) the ultimate test of the First Amendment." *Gillette v. United States*, (J. Douglas, dissenting) 401 U.S. at pg. 465, 469. See Milton Konvitz, *Religious Liberty and Conscience* 106 (1968); Redlich and Feinberg, *Individual Conscience and the Selective Service Objector: The Right Not to Kill*, 44 NYUL Rev. 875, 891 (1969).

The duty to obey God rather than men is rooted in the beginnings of the Catholic Church. When told to stop preaching by the Sanhedrin to whom they were subordinate by law, Peter and the apostles answered and said, "We must obey God rather than men." Acts 5:29, The Holy Bible. The duty is still the same in our day. Pope Paul VI expressed it as follows:

> "On his part, man perceives and acknowledges the imperative of the divine law through the meditation of conscience. In all his activity a man is bound to follow his conscience, in order that he may come to God, the end and purpose of life." Declaration on Religious Freedom I:3 in Documents of Vatican Council II, p. 369 (Newman Press 1966).

Pope John XXIII said in Part II of Pacem in Terris, Paragraph 46 (Paulist Press 1963): "Human society can be

neither well-ordered nor properous unless it has some people invested with legitimate authority to preserve its institutions . . . These however derive their authority from God, as St. Paul teaches in the words, *There exists no authority except from God.* These words of St. Paul are explained thus by St. John Chrysostom: . . . *What I say is, that it is the divine wisdom and not mere chance, that has ordained that there should be government, that some should command and others obey.*" Paragraph 50 adds: "When in fact, men obey their rulers, it is not at all as men that they obey them, but through their obedience it is God . . . since He has decreed that men's dealings with one another should be regulated by an order which He Himself has established."

"Since the right to command is required by the moral order and has its source in God, it follows that, if civil authorities legislate for or allow anything that is contrary to that order and therefore contrary to the will of God, neither the laws made nor the authorizations granted can be binding on the consciences of the citizens, since *we must obey God rather than men.*'[4] *Id.*, at Paragraph 51, quoted in *Gillette*, 401 U.S. at 470, note 1, 2. (Emphasis in original)

Thus, where one makes the claim that the state violates the divinely prescribed imperatives of the moral order, the claims of the state to the resources of the citizens are not binding on the citizens (or Appellants in this particular situation) when the state allows its resources to be used to violate the moral order since the state itself stands under the moral law.' The trial court should have considered the violation of conscience of the Appellants and not summarily

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[4]See Render Unto Caesar, Michael McKee, The National Pro-Life Journal, Vol. 6, No[ 3, Summer 1981, pp. 23-30.

dismissed it in the light of the theological and legal history of protetcion of rights of conscience.

## 4. THE COURT EXCEEDED ITS AUTHORITY WHEN IT SUMMARILY DETERMINED THAT THE PETITIONERS' RIGHTS OF CONSCIENCE AND FREE EXERCISE OF RELIGION HAD NOT BEEN VIOLATED.

Isaac Backus, a Baptist leader for religious liberty in the colonies, declared—

> "We view it to be our incumbent duty to render unto Caesar the things that are his but also that it is of as much importance not to render unto him anything than belongs only to God, who is to be obeyed rather than man." Isaac Backus on Chuch, State and Calvinism 1754-1789, Wm J. McLoughlin, ed. (1965), p. 317.

Similarly, John Locke in his letter concerning toleration said,

> "the care of souls is not committed to the civil magistrate, any more than to other men. It is not committed unto him, I say by God; because it appears not that God has ever given any such authority to one man over another as to compel any one to his religion." John Locke, The Locke Reader, John W. Yolton ed. (1977), pg. 246.

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[7]Princes . . . owe subjection to the Laws of God and Nature. No body, no power, can exempt them from the obligations of that eternal law. J. Locke, of Civil Government 195. The Charter of this Tribunal evidences a faith that the law is not only to govern the conduct of little men, but that even rulers are as Lord Chief Justice Coke put it to King James, "under God and the law." The United States believed that the law long has afforded standards by which a judicial hearing could be conducted to make sure that we punish only the right men for the right reasons". *The Case Against the Nazi War Criminals*, Robert H. Jackson Opening Statement at the Nuremberg trials (1946), p. 70.

Thomas Paine, a Diest, wrote In Common Sense:

> "As to religion I hold it to be the indispensible duty of government to protect all conscientious professors thereof and I know of no other business which government hath to do therewith." Stokes Anson Phelps, Church and State in the United States (1950) I, pp. 318-319.

Thomas Jefferson concurred with this position. He said:

> "If the magistrate command me to bring my commodity to a publick store house I bring it because he can indemnify me if he erred and I thereby lose it; but what indemnification can be given one for the kingdom of heaven? I cannot give up my guidance to the magistrate because he knows no more of the way to heaven than I do and is less concerned to direct me right than I am to do right." Padover, Saulk, The Complete Jefferson (1943), p. 943, quoted at Church, State and Freedom, Pfeffer (1967), at pg. 106.

## 5. THE PETITIONERS ARE FORCED BY STATE ACTION ALTHOUGH NEUTRAL ON ITS FACE, TO CHOOSE BETWEEN A PROTECTED LIBERTY INTEREST IN THEIR HOME OR THEIR RELIGIOUS BELIEFS.

The Amended Complaint on its face alleges a prima facie case of violation by the state of the free exercise of religion. The Appellants alleged in their Complaint that they are owners of their homestead located in Ramsey County, Minnesota, and therefore, are required to pay taxes to the Respondents in connection with the ownership of their home. These facts were admitted by the Respondens in their Answer. It may also be noted that if a homeowner does not pay real estate taxes to the Respondents, property owned by the Appellants would be foreclosed by

the Respondents and taken over by the Respondents (M.S.A. Chapter 279, et seq.). Thus, one of the factors not considered by the trial court is a valuable property right of the Appellants, i.e., the right to own and enjoy a home.

Homesteads are treated by state law as a special kind of property interest. M.S.A. 290.48 exempts homesteads from seizure by a sheriff under warrant for income tax; valuation and assessment of homesteads are given tax treatment differently from other property, M.S.A. 273.13; see generally 510.01 et seq.; homesteads are also exempt from claims of creditors under Minnesota law.

Various United States Supreme Court decisions have included the establishment or ownership of a home within the purview of liberty interests protected by the Federal Constitution and made applicable to the states and its political subdivisions by the 14th Amendment. For example, in *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1922), the right to "establish a home" was included as a protected liberty interest as part of the "pursuit of happiness by free men". The right to "inherit, purchase, lease and sell and convey property" was held to be "fundamental right". See *Civil Rights cases*, 109 U.S. 3, 22 (1883); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1971); J. Locke, Of Civil Government 82-85 (1924); J. Adams, A Defense of the Constitutions of Government of the United States of America, in F. Coker, Democracy, Liberty, and Property 121-132 (1942); 1 W. Blackstone, Commentaries *138-140.

The United States Supreme Court in a number of decisions has upheld religious liberty where the individual was coerced by state action, although neutral on its face, to

choose between a liberty or property interest which is guaranteed by the state and one's religious or political liberty. In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), the court held invalid a statute requiring a flag salute and pledge of allegiance in all schools, where some students had religious objections to these acts.

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the State of Michigan enacted legislation authorizing a system for union representation of local government employees. If a government employee did not wish to join the union, a service fee was required to be paid to the union in lieu of union dues. Abood objected to the expenditure of the funds paid to the union for advancement of political purposes with which he did not agree and claimed that this infringed upon his constitutionally protected freedoms guaranteed by the First Amendment. This Court held that

> " the Constitution requires . . . that such expenditures be financed from charges, dues or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." Pp. 235-236.

Similarly, interference with religious beliefs was condemned in *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). The court held that disqualification of appellant for unemployment compensation benefits because of her refusal to accept Saturday employment contrary to her religious belief, was a violation of her free exercise rights.

Thus, in *Barnett*, *Verner* and *Abood* there was a state law which was neutral on its face. In *Barnett* it was a state statute requiring allegiance to the flag; in *Verner* one was

ineligible for state benefits; in *Abood* the law required those not joining a union to pay a service fee to the union in lieu of union dues. All of these state laws were neutral on their face. So is the state law in this instance which requires all property owners to pay real estate taxes. It is the *effect* of the law on particular persons that is the real issue.

In *Barnett* the Jehovah's Witness was forced to choose between public education and his religious beliefs. In *Verner* the Seventh Day Adventist was forced to choose between employment and eligibility for unemployment benefits and his religious beliefs. *Abood* was forced to choose between his employment and his political beliefs. All of these situations the U.S. Supreme Court found to be the kind of coercion which the First Amendment prohibits. All of the situations involved the individual giving up a substantial property right and liberty (education, employment, unemployment compensation) which was recognized by the government.

In the instant case the Petitioners are forced to choose between continued ownership of a home and their religious beliefs. If they fail to pay their taxes the home will be foreclosed and sold. They will be giving up a substantial liberty and property interest which has long been recognized as fundamental to the pursuit of happiness.

## 6. THE PETITIONERS ARE ENTITLED TO PREVAIL EVEN IF THE BURDEN ON THEIR FREE EXERCISE OF RELIGION IS ONLY INDIRECT.

Various court decisions have held that even an "incidental" burden on the Free Exercise of Religion must be

justified by a "compelling state interest". The Supreme Court of Delaware therefore held in *Keegan v. University of Delaware*, 349 A.2d 14, 17 (1975):

> "Once the individual demonstrates some constitutional burden, whether substantial or incidental, direct or indirect, upon his free exercise of religion, the state must show a 'substantial interest' sufficient to sustain its acts."

Similarly, the United States Supreme Court in *Braunfield v. Brown*, 366 U.S. 599, 607 (1961), held that "if the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only *indirect*." (emphasis added).

The Petitioners do not have to actually participate directly in abortions, sterilization or contraceptions in order to gain the relief requested here. It is sufficient that the burden be only "incidental" or "indirect" in the absence of a compelling state interest.

## 7. THE COURT FAILED TO RECOGNIZE THAT FREEDOM OF RELIGION IS A FUNDAMENTAL RIGHT AND THE GOVERNMENT MUST DEMONSTRATE A COMPELLING STATE INTEREST BEFORE IT CAN INFRINGE UPON THAT RIGHT.

"Freedom of religion is a fundamental personal right." *Jones v. Opelika*, 316 U.S. 584 (1942). It holds a preferred position. *Follett v. McCormick*, 321 U.S. 573 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). The preferred position of freedom of religion is maintained as against

the constitutional rights of owners of property. *Marsh v. Alabama*, 326 U.S. 501 (1945).

Numerous United States Supreme Court decisions have protected freedom of religion unless the state could demonstrate a compelling state interest in the regulation of a subject within the state's constitutional power to regulate. In *Sherbert v. Verner*, 374 U.S. 398, 403 (1963), this court held that if state action was to be upheld—

> "[I]t must because [it] represents no infringement by the State of [the] constitutional rights of free exercise or because any incidental burden on the free exercise of . . . religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . .'" 374 U.S. at 403.

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), this Court said "*only those interests of the higest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.*" *Yoder* at pg. 215 (emphasis added).

In *Ohio v. Wisner*, 351 N.E.2d 750 (Ohio, 1976), the state's interest in insuring minimum curriculum and faculty standards was not enough to outweigh free exercise claims. In *Gillette v. United States*, 401 U.S. 437 (1971), the nation's unassailable interests in self-defense and efficient conduct of war were substantial enough to out-weight the religious liberty interests. In *United States v. Lee*, 102 S.Ct. 1051, 50 USLW 4201, 4203 (1982), this Court held that the government's interest in assuring mandatory and continuous participation in the Social Security system was "very high" and held that it was an over-riding interest.

In the case before this Court, the trial court made no attempt whatsoever to determine whether or not the state had any compelling state interest in funding elective abortion, sterilizations or contraceptions. The Court made no analysis of the nature of the free exercise claim of the Appellants beyond the allegations of the pleadings. It made no attempt to weigh the merits of the various interests.

Does the state have any compelling state interest in promoting elective abortions, sterilizations or contraceptions? Where is it? Appellants submit that it does not. It is a privacy interest as determined by many court decisions (see discussion elsewhere). None of this analysis was made by the trial court and this is essential to the determination of the issues involved here.

## 8. INCOME TAX PROTESTS AGAINST USE OF TAX REVENUE TO CONDUCT WAR DO NOT APPLY TO THE FREE EXERCISE OF RELIGION CLAIM OF PETITIONERS

The Court relied on *Autenrieth v. Cullen*, 418 F.2d 586 (9th Cir. 1969), and other similar cases relating to *income tax* protests against use of revenue for conduct of *war*. None relate to payment of real estate taxes on one's homestead and the *direct coercive effect* by forcing Appellants to choose between giving up their home or violating their conscience. This is a special liberty and property interest in one's home not present in other taxpayer cases. (See discussion elsewhere.) Also in war or national defense situations, there are overriding and compelling governmental interests arising from the duty of Congress under article I, Section 8, of the Constitution to provide for the national

defense. Congress has specific power to declare war and raise and support armies and appropriate money for it. See *Rostker v. Goldberg*, 101 S.Ct. 2646, 2651 (1981) ("[P]erhaps in no other area has the Court accorded Congress greater deference" than in matters of "national defense and military affairs.") See also *Brown v. Glines*, 444 U.S. 348 (1980); *Greer v. Spock*, 424 U.S. 828 (1976); *Parker v. Levy*, 417 U.S. 733 (1974). Clearly, waging war and appropriating money for it is a compelling interest. This is so because the peace and safety of the government itself is threatened. For example, in *Gillette v. United States*, 401 U.S. 437 (1971), the claims of a conscientious objector who protested the Vietnam War as unjust were denied because of the fundamental interest of the government to protect its citizens. In the instant case, there is no compelling state interest in promoting elective abortions, contraceptions or sterilizations. These are privacy interests of individuals. The government has little or no interest. The taxation and expenditure of tax funds for these purposes is *ultra vires*—the case relied upon does not apply here.

**9. THE RESPONDENTS VIOLATED ARTICLE 1, SECTION 16, OF THE MINNESOTA STATE CONSTITUTION RESPECTING INTERFERING WITH INDIVIDUAL CONSCIENCE AND ALSO ESTABLISHING A PREFERENCE BY LAW TO A RELIGIOUS ESTABLISHMENT.**

The Minnesota State Constitution contains a Freedom of Conscience provision in its Bill of Rights (Art. 1, Section 16) which bars attempts of the state (or anyone else) to control or interfere with the rights of conscience of the individual. (See Appendix)

The freedom of conscience article makes it clear that rights of conscience are vested in the people—individually or collectively. The freedom of conscience provisions stand as a bulwark against intrusion by the state except in limited instances where the peace or safety of the state is threatened or used to attempt to excuse acts of licentiousness, none of which are claimed to be applicable here.
none of which are claimed to be applicable here. Citizens are not required to "get in step" with the state when control of or interference with rights of conscience are involved. Similarly the state acts beyond its authority under its own State Constitution when it establishes a religious preference by law (see Establishment of Religion discussion).

The Preamble to the State Constitution makes it clear that civil and religious liberty is not an act of grace from the state—its source lies elsewhere. It cames as an "endowment from our Creator"—from God. It is a gift to each person as a creature of the Creator. The state is not free to withhold freedom and liberty from whoever it chooses because the source of liberty is not derived from the state. What is not derived from the state cannot be taken away or limited by action of the state unless the peace or safety of the state itself is threatened. The trial court and the Minnesota Supreme Court have failed to fulfill a necessary and important duty by summarily dismissing the allegations of the Complaint in the light of the guarantees of the Minnesota State Constitution.

## 10. THE TAXATION OR USE OF TAX FUNDS FOR ELECTIVE ABORTION, CONTRACEPTION AND STERILIZATION BASED UPON PRIOR COURT DECISIONS IS FOR A PRIVATE PURPOSE AND NOT A PUBLIC PURPOSE AS IT IS A PRIVACY INTEREST OF INDIVIDUALS.

In *Roe v. Wade*, 410 U.S. 153, 155 (1973), established the right of abortion free from state interference based on the right of privacy.

On April 15, 1981 the United States District Court of the District of Minnesota in *Tice Sales Company v. State of Minnesota* (Civ. 4-80-487) struck down a state law regulating sale of articles relating to prevention of contraception or disease on the basis of the right to privacy and cited *Breard v. Alexandria*, 341 U.S. 622 (1951); *Monroe v. Pape*, 365 U.S. 167 (1961); *Frank v. Maryland*, 359 U.S. 360 (1959); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Carey v. Population Services International*, 431 U.S. 678 (1977); *Maher v. Roe*, 432 U.S. 464 (1977). One can only conclude from these holdings that contraception is a "right" free from state control.

There is no clear "right" to a sterilization as has been developed in the abortion and contraception cases. In *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1941), the U. S. Supreme Court struck down a state statute which provided for the sterilization of convicted criminal on equal protection grounds. Indeed, in that decision the Court noted that procreation not sterilization was a basic human right. However, if there is a "right" to sterilization under existing case law it is under the privacy concept.

Elective abortion, sterilization and contraception are privacy rights, i.e., the right to be left alone free from interference. If this is the case, then tax money from whatever source cannot be used to pay for or promote these activities. One cannot have it both ways. Either one is left alone and without aid from the state or other governmental authority or one can acknowledge the government's right to be involved and receive public benefits. The court, as a matter of law, should find that the state nor its political subdivisions cannot taxe its citizens or expend funds to promote these activities.

## 11. MINNESOTA STATE LAW PROHIBITS THE TAXATION OR EXPENDITURE OF FUNDS FOR THE USE OF ELECTIVE ABORTION, STERILIZATION OR CONTRACEPTION.

Minn. Stat. Chapter 256B specifically limits medical assistance payments to abortions which are a medical necessity as defined by 256B.02, Subd. 8(13). M.S.A. 256B.40 specifically prohibits medical assistance funds to medically necessary abortions which are eligible for funding under 256B.02, Subd. 8. Also, M.S.A. 256B.011 states that it is the policy of the State of Minnesota to prefer normal childbirth over abortion. Thus, elective or medically unnecessary abortions as defined in the various provisions of M.S.A. 256B cannot be funded with public funds. Nothing in M.S.A. 256B or any other state law specifically authorizes the use of public funds for elective sterilization or contraception.

Even if there were specific legislative authority, the acts complained of do not meet a necessary *public* purpose. It cannot be said that such acts meet a public health purpose or any public purpose. If actions are *elective*, they may be

for any reason or for no reason. Elective abortion is the willful, wanton, arbitrary destruction of innocent, helpless human life in the womb. By definition, it is not for a purpose that is medically necessary. It can occur because one does not care for the sex of the unborn child. It can occur because one is mad at her boyfriend or spouse. It can occur because the parents of a minor child are embarrassed with the pregnancy out of wedlock and coerce the girl to have an abortion. It can occur because of lust or from hedonism or for reason of convenience. There are other examples as well, many of which could apply to sterilization and contraception as well.

Even if one concedes that such activities constitute a constitutional "right", public funds or resources cannot be used even if a citizen gives an "informed consent". For example, it has been held that citizens have a constitutional right to travel. However, a citizen cannot present himself at the doorstep of a public building and give his "informed consent" to take a vacation trip to Hawaii and obtain public funds or use public resources to do so. This is simply because there is no public purpose involved. The government does not pay for pleasure trips for its citizens as they are private, personal interests, nor can it pay for elective abortions, sterilization or contraception.

The state and its municipal subdivisions or agencies may expend public money only for a public purpose. *Visina v. Freeman* (1958), 252 Minn. 177, 89 N.W.2d 635; *Port. Auth. v. Fisher* (1964), 269 Minn. 276, 132 N.W.2d 183; *City of Pipestone v. Madsen* (1970), 287 Minn. 357, 178 N.W.2d 594. Generally, a public purpose is such activity as will serve as a benefit to the community and one which is directly related to the functions of government.

The State Constitution forbides taxation for a private purpose. Minn. Const. Art. X, Section 1, states: Taxes . . .

shall be levied and collected for public purposes. The legislature cannot levy a tax for a private purpose or authorize a municipality to do so. Article XII, Section 1, of the Minnesota State Constitution states (in part)—"The legislature shall pass no local or special law authorizing public taxation for a private purpose". This is an implied limitation on the taxing power growing out of the nature of taxation itself. *State ex rel. Wheeler v. Foley* (1883), 30 Minn. 350, 15 N.W. 375. See also 13A Dunnell's Minnesota Digest, Municipal Corporations, Section 6586b (3rd ed. rev. 1961); 20 Minnesota L. Rev. 550 (1936); 4 Antieau's Local Government Law §41.00 (1966); 71 Am. Jur. 2d 87.

Petitioners contend that expenditure of public funds or use of the resources of government to promote elective abortions, contraception or sterilization is not taxation for a public purpose nor it is legislatively decreed. Taxation for such purposes is expressly prohibited by our State Constitution as one cannot tax for private purposes.

Petitioners do not claim that they have any "right" not to pay real estate taxes. They do claim a right not to pay taxes for illegal purposes.

## CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and decree of the Supreme Court of the State of Minnesota.

Respectfully submitted,

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